BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	

To: The Commission

JOINT REPLY COMMENTS OF ALLIANT ENERGY CORPORATION, WEC ENERGY GROUP, INC., AND XCEL ENERGY SERVICES INC.

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EXECUTIVE SUMMARY

The primary mission – and public obligation – of Alliant Energy Corporation, WEC Energy Group, Inc., and Xcel Energy Services Inc. (the "Midwest Electric Utilities") is the safe, reliable, and affordable provision of essential electric and natural gas utility services to the public. Thus, for the Midwest Electric Utilities, maintaining and protecting the safety, reliability, and integrity of their utility infrastructure is of paramount importance. The record shows, however, that many of the proposals raised in this proceeding will not achieve the Commission's stated goal of accelerating access to poles because they fail to address many of the underlying causes of delays in the pole attachment process. Rather, many of these proposals could put the safety, reliability, and integrity of the existing electric and communications infrastructure – as well as the safety of workers and the public – at undue risk of harm and would increase the cost of broadband deployment.

First, the record demonstrates that shortening the timeframes for various stages of the pole attachment application process would increase the risk to the safety and reliability of communications and electric distribution infrastructure and would result in significant additional costs for all parties to the pole attachment process. Arguments that have been presented in favor of shortened timeframes ignore the resource constraints that utilities are already under, the increased risk to the safety of the public and to the safety and reliability of both communications networks and electric distribution systems, and the significant additional costs that would be imposed on new attachers as well as on utilities and their customers. In other words, the costs of broadband deployment for new attachers would be driven up significantly, the cost burden on electric utility customers to subsidize broadband deployment would be driven up significantly, and the risk to the safety, reliability, and integrity of the nation's electric distribution and communications infrastructure would be driven up significantly, all for the sake of trimming two

or three weeks off of the application review process – a measure that will neither address the underlying causes of delays in the pole attachment process nor serve to accelerate broadband deployment.

In addition, various commenters have submitted initial comments containing vague, anecdotal allegations against utility pole owners that can neither be verified nor substantiated, or have made specific allegations against a particular utility that misrepresent, mischaracterize, or ignore key relevant facts in order to inaccurately and unfairly describe current utility pole attachment practices. Such assertions are at best unreliable, and therefore cannot serve as a reasonable basis for any Commission action.

As it considers the applicable timeframes for various stages of the pole attachment process, a key fact that the Commission must bear in mind is that a utility's workload and ability to review and approve applications, as well as to perform any necessary make-ready on electric facilities, is based on the cumulative number of all poles covered by all applications under review at any given time, not on the specific number of poles requested by a single attacher. Accordingly, the recommendations made by various commenters to adopt shorter review timeframes or make-ready timeframes for "smaller" orders from individual attachers are impractical and unrealistic. Among other things, such an approach would require a utility to move any "small" application up in the queue ahead of any already-pending "normal" applications, even if the normal applications were submitted first. The Commission must also decline further consideration of various proposals to engage in regulatory micro-management of electric utility operations, such as utility pole attachment application and management processes or electric utility safety and construction standards. Such measures risk compromising both the safety and security of the nation's infrastructure, would impose significant resource and cost

burdens on utilities and their customers, and would be beyond the scope of the Commission's legal authority.

With respect to make-ready and construction work on poles, it is essential that the Commission clarify that any changes to the make-ready timelines or to the make-ready process discussed in this proceeding would apply *only* to the performance of make-ready work in the communications space and would *not* apply to the performance of any work above the communications space on the pole. The performance of any make-ready and construction work in the area above the communications space is inherently dangerous and must remain under the full control and direction of the utility because it raises significant safety issues and implicates the safety, reliability, and integrity of the nation's electric grid. Any shortening of the make-ready timeframes for work within the communications space also raises safety and reliability concerns, and the record indicates that a more effective and efficient way to improve the make-ready process would be to provide pole owners with an effective mechanism to enforce compliance with applicable safety and engineering codes and requirements such as those adopted by the State of Oregon.

Finally, the Midwest Electric Utilities reiterate their strong opposition to the Commission's proposals for excluding capital costs from the pole attachment rental rates, as well as to the Commission's proposals concerning the relationship between ILECs and utility pole owners. The Midwest Electric Utilities agree with other commenters that these proposals are unwarranted, arbitrary and capricious, and contrary to established precedent. Moreover, these proposals will impose significant burdens on utilities, unfairly subsidize communications attachers at the expense of electric utility customers, and will not facilitate the deployment of broadband service.

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Alliant Energy Corporation, WEC Energy Group, Inc., and Xcel Energy Services Inc., on behalf of their electric utility operating subsidiaries (collectively, the "Midwest Electric Utilities"),[1] hereby submit these Joint Reply Comments in response to the initial comments submitted to the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[2]

As stated in their initial comments, the primary mission – and public obligation – of the Midwest Electric Utilities is the safe, reliable, and affordable provision of essential electric and natural gas utility services to the public. Thus, for the Midwest Electric Utilities, maintaining and protecting the safety, reliability, and integrity of their utility infrastructure is of paramount importance. The record shows, however, that many of the proposals raised in this proceeding

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[1]/ The term "Midwest Electric Utilities" is used herein only as a term of convenience for referring to the Joint Commenters collectively and does not refer to or imply the existence of any formal organization or association.

[2]/ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, FCC 17-37 (rel. April 21, 2017) ("*NPRM*").

will not achieve the Commission's stated goal of accelerating access to poles because they fail to address many of the underlying causes of delays in the pole attachment process. Rather, many of these proposals could put the safety, reliability, and integrity of the existing electric and communications infrastructure – as well as the safety of workers and the public – at undue risk of harm and would increase the cost of broadband deployment.

First, the record demonstrates that shortening the timeframes for various stages of the pole attachment application process would increase the risk to the safety and reliability of communications and electric distribution infrastructure and would result in significant additional costs for all parties to the pole attachment process. Arguments that have been presented in favor of shortened timeframes ignore the resource constraints that utilities are already under, the increased risk to the safety of the public and to the safety and reliability of both communications networks and electric distribution systems, and the significant additional costs that would be imposed on new attachers as well as on utilities and their customers. In addition, various commenters have submitted initial comments containing vague, anecdotal allegations against utility pole owners that can neither be verified nor substantiated, or have made specific allegations against a particular utility that misrepresent, mischaracterize, or ignore key relevant facts in order to inaccurately and unfairly describe current utility pole attachment practices. Such assertions are at best unreliable, and therefore cannot serve as a reasonable basis for any Commission action.

The Commission must also decline further consideration of various proposals to engage in regulatory micro-management of electric utility operations, such as utility pole attachment application and management processes or electric utility safety and construction standards. Such measures risk compromising both the safety and security of the nation's infrastructure, would

impose significant resource and cost burdens on utilities and their customers, and would be beyond the scope of the Commission's legal authority.

With respect to make-ready and construction work on poles, it is essential that the Commission clarify that any changes to the make-ready timelines or to the make-ready process discussed in this proceeding would apply *only* to the performance of make-ready work in the communications space and would *not* apply to the performance of any work above the communications space on the pole. The performance of any make-ready and construction work in the area above the communications space is inherently dangerous and must remain under the full control and direction of the utility because it raises significant safety issues and implicates the safety, reliability, and integrity of the nation's electric grid. Any shortening of the make-ready timeframes for work within the communications space also raises safety and reliability concerns, and the record indicates that a more effective and efficient way to improve the make-ready process would be to provide pole owners with an effective mechanism to enforce compliance with applicable safety and engineering codes and requirements such as those adopted by the State of Oregon.

Finally, the Midwest Electric Utilities reiterate their strong opposition to the Commission's proposals for excluding capital costs from the pole attachment rental rates, as well as to the Commission's proposals concerning the relationship between ILECs and utility pole owners. The Midwest Electric Utilities agree with other commenters that these proposals are unwarranted, arbitrary and capricious, and contrary to established precedent. Moreover, these proposals will impose significant burdens on utilities, unfairly subsidize communications attachers at the expense of electric utility customers, and will not facilitate the deployment of broadband service.

I. ACCELERATED TIMELINES COULD PUT THE SAFETY OF EXISTING INFRASTRUCTURE AT RISK AND WILL INCREASE THE COST OF BROADBAND DEPLOYMENT

The record of this proceeding shows that many of the proposals raised in the *NPRM* and by certain commenters will not achieve the Commission's stated goal of accelerating access to poles because they fail to address many of the underlying causes of delays in the pole attachment process. Rather, as discussed below, the Commission's proposals could put the safety, reliability, and integrity of the existing electric and communications infrastructure – as well as the safety of workers and the public – at undue risk of harm[3] and would increase the cost of broadband deployment.

A. Shorter Timeframes for Application Reviews Would Increase the Risk to the Safety and Reliability of Communications Networks and Electric Distribution Systems and Result in Significant Additional Costs for All Parties

The record of this proceeding clearly demonstrates that the current timeframe for utilities to conduct the necessary survey and engineering review and make a decision on a complete pole attachment application strikes an appropriate balance between communications companies' commercial interest in prompt access to poles with the responsibilities and obligations of electric utilities to protect and maintain the safety, reliability, and integrity of existing electric and communications infrastructure.[4] Although various communications companies argue that these

[3]/ *See NPRM* at ¶ 4.

[4]/ *See* Comments of the Midwest Electric Utilities at 11-14; Comments of CenterPoint Energy Houston Electric, LLC, Dominion Energy Virginia and Florida Power & Light Co. (the "POWER Coalition") at 4-10; Comments of Ameren Corp., American Electric Power Service Corp., Duke Energy Corp., Entergy Corp., Oncor Electric Delivery Company LLC, Southern Company, and Tampa Bay Electric Co. (the "Electric Utilities Group") at 11-14; Comments of the Coalition of Concerned Utilities at 22-28.

timeframes should be shortened,[5] their arguments ignore the resource constraints that utilities are already under, the increased risk to the safety of the public and to the safety and reliability of both communications networks and electric distribution systems, and the significant additional costs that would be imposed on new attachers as well as on utilities and their customers.

As described by the Midwest Electric Utilities and other commenters, the process of reviewing and approving a complete pole attachment application requires the utility to conduct surveys and engineering and design reviews to ensure that the requested attachments can be made in compliance with all applicable safety and engineering standards and requirements.[6] To illustrate the extent of work that a utility must undertake during the 45-day application review period, the Electric Utilities Group provided in its comments a list of the typical work that a utility must perform, and also included as an exhibit the process charts created by three different electric utilities that outline the steps to be performed during the review period.[7] In addition, the performance of necessary on-site surveys and reviews sometimes requires travel to remote, rural areas that lack major highways or roadways, meaning that time is also needed for scheduling, coordinating, and deploying personnel to these areas to perform these tasks.[8] All of these steps must be completed – and performed with due care – and cannot be eliminated,

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[5]/ *See, e.g.*, Comments of NCTA at 6-7; Comments of the American Cable Association ("ACA") at 41-44; Comments of NTCA – The Rural Broadband Association ("NTCA") at 8; Comments of Level 3 at 1-2; Comments of ExteNet Systems ("ExteNet") at 52; Comments of Lightower Fiber Networks ("Lightower") at 4-5; Comments of Lumos Networks at 5-6; Comments of WTA – Advocates for Rural Broadband ("WTA") at 19.

[6]/ *See* Comments of the Midwest Electric Utilities at 11; Comments of the POWER Coalition at 5-6; Comments of the Electric Utilities Group at 11-12; Comments of the Coalition of Concerned Utilities at 23-24.

[7]/ Comments of the Electric Utilities Group at 11-12 and Exhibit 1; *See also* Comments of the POWER Coalition at 5-6.

[8]/ *See* Comments of the Midwest Electric Utilities at 11; Comments of the Coalition of Concerned Utilities at 23.

rushed, or watered-down to meet an artificially-shortened timeframe without compromising the safety, reliability, and integrity of the nation's electric distribution systems and of the existing electric and communications infrastructure.

The Midwest Electric Utilities and other commenters have found that they are generally able to complete the application review and approval process for complete applications within the current 45-day timeframe, although doing so requires them to maximize all of their available resources.[9] However, as the POWER Coalition observed, "these resources are now fully utilized and cannot be further stretched to meet shorter deadlines without compromise to critical attachment evaluation processes, or the manner in which such processes are executed."[10] Thus, if the current timeframe for application review were to be shortened in any way, the only way that utilities might be able to meet such a shorter timeframe on any consistent basis would be to increase staff at a substantial additional cost that would be directly attributable to the attaching entities and which would have to be borne both by new attachers and by the utilities and their customers (*i.e.*, the electric ratepayers).[11] In other words, the costs of broadband deployment for new attachers would be driven up significantly, the cost burden on electric utility customers to subsidize broadband deployment would be driven up significantly, and the risk to the safety, reliability, and integrity of the nation's electric distribution and communications infrastructure would be driven up significantly, all for the sake of trimming two or three weeks off of the

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[9]/ *See, e.g.*, Comments of the Midwest Electric Utilities at 7 and 11-12; Comments of the POWER Coalition at 25.

[10]/ Comments of the POWER Coalition at 25.

[11]/ *See* Comments of the Midwest Electric Utilities at 12-14; Comments of the Electric Utilities Group at 12-13; Comments of the POWER Coalition at 7; Comments of Puget Sound Energy at 3; Comments of the Texas Office of Public Utility Counsel at 3-4 (noting also the increased cost resulting from the use of overtime).

application review process – a measure that will neither address the underlying causes of delays in the pole attachment process nor serve to accelerate broadband deployment.

Furthermore, there is no certainty that utilities would even be able to obtain sufficient additional personnel and resources to allow expedited review of pole attachment applications. The availability of qualified resources, including in-house personnel and outside contractors, is not a given and may be difficult to find, especially in the near-term. Utilities also face various constraints in their ability to hire additional staff or retain outside contractors, such as the possible need for review and approval by state public utility regulators of additional staffing costs, as well as union contract issues and relations with their unionized workforces.[12] Even if additional staff resources could be identified and assigned, it would still take time to sufficiently train new staff not only on the companies' pole attachment policies and procedures, but also on all of the relevant codes, regulations, and specifications that must be taken into consideration and applied to the review of each pole attachment application in order to ensure the safety and integrity of the pole infrastructure.[13]

Due to the resource constraints that utilities are already under, the increased risk to the safety of the public and to the safety and reliability of both communications networks and electric distribution systems, and the significant additional costs that would be imposed on new attachers as well as on utilities and their customers, the Commission should decline any shortening of the current application review timeframe and should focus its efforts instead on

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[12]/ *See* Comments of the Edison Electric Institute ("EEI") at 24.

[13]/ *See* Comments of the POWER Coalition at 5-6 (describing the need for company-specific expertise when evaluating pole attachment applications to address company-specific safety, reliability, and engineering factors).

other aspects of the pole attachment process and on promoting collaboration and cooperation between pole owners and communications attachers.[14]

B. Surveys and Engineering and Design Reviews are Essential Elements of the Review Process

In response to the *NPRM*, some communications companies have urged the Commission to either restrict utilities' ability to conduct surveys and perform engineering and design reviews and analyses when reviewing pole attachment applications or to turn these steps over entirely to requesting attachers.[15] Experience has shown, however, that the surveys and engineering and design information submitted by requesting attachers are often error-ridden, inaccurate, and incomplete, and thus insufficiently reliable to ensure the safety and integrity of the pole infrastructure.[16] These steps must therefore remain under the utility's discretionary control and supervision.[17]

In its comments, the American Cable Association ("ACA") asserts that a "simple visual inspection" can be sufficient to determine capacity and the need for make-ready, without conducting any pole loading or any other analysis or review.[18] ACA further complains about the

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[14]/ *See* Comments of the Electric Utilities Group at 22 ("If the Commission truly wants to facilitate deployment of the next generation of communications infrastructure, it will adopt policies that encourage, rather than discourage, collaboration, cooperation, and innovation."); Comments of the Coalition of Concerned Utilities at 3 (stating that "the best public policy is one that encourages all affected parties to resolve their attachment issues collaboratively").

[15]/ *See, e.g.*, Comments of Charter Communications at 36; Comments of ACA at 23-24 and 40-41.

[16]/ *See, e.g.*, Comments of the Midwest Electric Utilities at 15-16; Comments of the POWER Coalition at 8.

[17]/ *See* Comments of the Electric Utilities Group at 14 ("[E]liminating or shifting control of the survey solely to communications attachers would undermine the process in two ways: (a) it would lead to incomplete/incompatible data that would ultimately delay other aspects of the engineering process; and (b) it would lead to lower network reliability and threaten public safety – a problem for all stakeholders.").

[18]/ Comments of ACA at 23-24 and 40-41.

survey and engineering review process conducted by Alliant Energy in particular, questioning the need for Alliant Energy to undertake these steps.[19] ACA's cavalier view of engineering and safety perfectly illustrates the challenges facing utility pole owners in ensuring the safety and integrity of their pole infrastructure.

As discussed in more detail below in these reply comments, Alliant Energy had over the years been experiencing an increasing number of safety and construction violations on its infrastructure by communications attachers.[20] Alliant Energy also found that the surveys and engineering designs that were being submitted by requesting attachers – apparently based upon "simple visual inspections" – had become so inaccurate and error-ridden that they could not be relied on. Alliant Energy therefore determined that it was necessary to require all of the survey, engineering, and design work for new attachments to be performed by its contractor and directed its contractor to take a more stringent approach in its review process in order to address these issues and to protect the safety and integrity of Alliant Energy's electric distribution poles. To the extent that there are complaints that Alliant Energy no longer trusts attachers' own surveys and engineering designs, Alliant Energy notes that – even now – approximately 85% of the initial applications that requesting attachers submit have errors that Alliant Energy's contractor must correct.[21] Furthermore, Alliant Energy's approach ultimately provides attachers with greater efficiency by saving them the time and cost of having to perform their own engineering and design work, as well as the time and cost of having to collect missing and corrected information and prepare and submit corrected applications.

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[19]/ Comments of ACA at 23 and Exhibit B (Declaration of Patrice M. Carroll, Chief Executive Officer of ImOn ("Carroll Declaration")) paras. 4-5.

[20]/ *See* Section I.C., *infra*.

[21]/ *See* Comments of ACA, Exhibit B (Carroll Declaration) at para. 5; Comments of the Midwest Electric Utilities at 16 and 23.

Every electric utility operates under its own unique circumstances and environment, and thus there is no "one-size-fits-all" approach to the application review process that is suitable in every case. Alliant Energy adopted its particular application review and management process based on its specific operational circumstances. Similarly, some utilities require that all critical elements of the application review and evaluation process be conducted only by their own personnel or contractors,[22] while others may allow some of this work to be performed by the attachers themselves subject to the utility's review.[23]

The salient factor is that – in every case – every step of the application review process is under the discretionary control and supervision of the utility, and the Commission must continue to ensure that utilities are provided the flexibility needed to adopt the measures and procedures best suited for their own unique circumstances. For this reason, the Commission should decline to adopt any mandate for utilities to implement an online electronic application process.[24] Although the use of online application systems has become increasingly prevalent, the implementation of such a system can impose a significant demand on a utility's resources and can involve a number of logistical and operational complications. Any effort to micro-manage utilities' application processes would thus not only exceed the Commission's statutory authority,[25] but would actually inhibit the pole attachment process and drive up the costs of deployment.

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[22]/ *See, e.g.*, Comments of the POWER Coalition at 5-6 (discussing CenterPoint Energy Houston Electric, LLC, Dominion Energy Virginia, and Florida Power & Light Company).

[23]/ *See, e.g.*, Comments of the Midwest Electric Utilities at 9-10 (discussing Wisconsin Public Service Corporation).

[24]/ *See* Comments of Mobilitie at 9; Comments of the Fiber Broadband Association at 8-9.

[25]/ *See* Comments of the POWER Coalition at 4.

C. Certain Commenters Inaccurately and Unfairly Describe Utility Pole Attachment Application Practices by Mischaracterizing or Omitting Key Relevant Facts

Various commenters submitted initial comments containing vague, anecdotal allegations against utility pole owners that can neither be verified nor substantiated, and which thus cannot form a basis for any reasoned action.[26] In cases where a commenter has made specific allegations against a particular utility, these allegations ignore, mischaracterize, or omit key relevant facts in order to inaccurately and unfairly describe current utility pole attachment practices.

In particular, ACA has made several allegations throughout its comments directly against Alliant Energy in order to unfairly portray Alliant Energy as a "bad actor" with respect to pole attachments. These allegations are based on sworn declarations by representatives of two communications companies that present carefully selected facts without context and in a misrepresentative manner. Alliant Energy hereby responds to ACA's allegations.

1. Alliant Energy's Pole Attachment Process and Policies

Prior to 2011, Alliant Energy handled the third party pole attachment application and management process in-house. However, Alliant Energy began experiencing a notable decline in the quality and accuracy of the information being provided by requesting attachers, which made the application review process more complicated and resource-intensive, and field reviews and inspections of Alliant Energy's infrastructure were revealing an ever-increasing number of safety and construction violations caused by improper or unauthorized attachment techniques by communications attachers.

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[26]/ *See, e.g*, Comments of ACA; Comments of NCTA at 5-6; Comments of Charter at 36; Comments of the Fiber Broadband Association at 4; Comments of Lightower at 3; Comments of ExteNet at 55-56.

When the Commission adopted the *2011 Pole Attachment Order*, Alliant Energy reviewed its pole attachment management process in detail and concluded that, due to internal resource constraints, the system that it had in place at the time would not have been able to effectively manage the expected increase in pole attachment requests while maintaining compliance with the *2011 Pole Attachment Order*'s newly-established timeframes. Accordingly, Alliant Energy developed and implemented its Attachment Tracking system ("AT system") – an online portal for processing and tracking pole attachment applications – and retained an experienced outside contractor, Mi-Tech,[27] to review the applications and complete the permitting process, including the performance of an initial field survey, engineering design and pole loading analysis, and the preparation of a make-ready estimate.[28]

As noted above, Alliant Energy had been experiencing a notable decline in the quality and accuracy of the information being provided by requesting attachers and an increasing number of safety and construction violations by communications attachments, and determined that its previous attachment practices and policies were insufficient to ensure the safety, reliability, and integrity of its pole infrastructure going forward. Accordingly, Alliant Energy directed Mi-Tech to take a more stringent approach in its review process in order to address these issues. In addition, Alliant Energy determined that the surveys and engineering designs that were being submitted by requesting attachers had become so inaccurate and error-ridden – with the rate of applications containing inaccurate or erroneous information approaching 100% – that

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[27]/ *See* http://www.mi-tech.us/ for additional information about Mi-Tech (last viewed July 17, 2017).

[28]/ *See* Comments of the Midwest Electric Utilities at 7-8.

they could not be relied on, and thus it was necessary to require all of the survey, engineering, and design work for new attachments to be performed by Mi-Tech.[29]

Although Alliant Energy made every effort to make the implementation of and transition to its new pole attachment management system as smooth as possible for all parties, some unforeseen problems and technical issues arose during this transition that unfortunately caused some issues for attachers. For example, in late 2015 Alliant Energy discovered that, due to a process integration issue, invoices for survey, engineering, and make-ready work were not being sent out, which resulted in a substantial backlog of unbilled invoices that needed to be corrected. As a result, a number of attachers ended up receiving invoices for all work performed over a period of up to two years rather than being invoiced as the work was completed. Alliant Energy also discovered at this time that its system had been set up to include only costs related directly to pole work in its estimates and that the system was not including associated costs, such as survey and engineering costs. These issues have now been corrected, and Alliant Energy has since resolved these issues with a number of affected attachers.

Overall, Alliant Energy's current pole attachment management system has significantly enhanced its ability to ensure that the applications it processes fully address all concerns regarding the safety and integrity of the electric system and existing communications infrastructure, and it has in fact sped up the overall application review and approval process for new attachments on Alliant Energy's distribution pole system.

With this factual background as context, Alliant Energy responds below to the specific allegations set forth in ACA's comments.

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[29]/ *Id*. at 15-16.

2. ACA Misrepresents Alliant Energy's Pole Attachment Practices

In its comments, ACA alleges that Alliant Energy "requires that all overlashing projects go through the full application process" and that Alliant Energy "seeks to impose" a requirement for full applications for any service drop line that involves an attachment to another pole.[30] ACA both misrepresents and mischaracterizes the actual statement made in the declaration that it cites to in support of these allegations, and both ACA's comments and the underlying declaration omit relevant key facts in order to present an inaccurate and misleading story to the Commission.

Specifically, in paragraph 8 of her declaration, Ms. Carroll does not describe Alliant Energy's *actual practice*, but instead presents her perspective of two issues – overlashing and service drops – that have been touched on during the course of negotiations for a new master pole attachment agreement between Alliant Energy and ImOn and which remain open for discussion.[31] As Ms. Carroll observes, ImOn's current practice with respect to overlashing and service drops is to "attach and notify," whereby ImOn is obligated to notify Alliant Energy soon after it performs the work.[32] However, Alliant Energy in fact seldom – if ever – receives any notification from ImOn or other attachers of any of their overlashing or service drop installations. Instead, Alliant Energy generally learns of these installations only when its personnel come across them by chance in the field. Alliant Energy has therefore raised the issue of overlashing and service drops during its current discussions with ImOn in an effort to ensure that the necessary notifications will be provided going forward, but Alliant Energy emphasizes that the resolution of this issue is still under consideration and no decision has yet been made.

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[30]/ Comments of ACA at 10-11, *citing* ACA Exhibit B (Carroll Declaration) at para. 8.

[31]/ Comments of ACA, Exhibit B (Carroll Declaration) at para. 8.

[32]/ *Id.*

ACA also points to the invoicing issues that ImOn and LISCO recently experienced with Alliant Energy as evidence of the need for additional Commission regulation, yet neither ACA nor the representatives of these companies provide the Commission with all of the relevant facts.[33] As discussed above, Alliant Energy discovered in late 2015 that, due to a process integration issue, invoices were not being sent out to attachers for work that had been performed, and as a result a number of attachers ended up being invoiced for all work performed over a period of up to two years. These invoicing issues have now been corrected. In sum, this was an inadvertent, one-time incident that cannot reasonably form the basis for regulatory intervention.

Moreover, as discussed above, ACA complains about the survey and engineering review process conducted by Alliant Energy and questions the need for Alliant Energy to undertake these steps.[34] ACA's complaints ignore the critical underlying fact that the reason Alliant Energy implemented its current application review process in the first place is that Alliant Energy had been experiencing an increasing number of safety and construction violations on its infrastructure by communications attachers – including ACA members – and that the surveys and engineering designs that were being submitted by requesting attachers – including ACA members – had become so inaccurate and error-ridden that they could not be relied on. Again, to the extent that there are complaints that Alliant Energy no longer trusts attachers' own surveys and engineering designs, even now approximately 85% of the initial applications that requesting attachers submit have errors that Alliant Energy's contractor must correct.[35]

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[33]/ Comments of ACA at 26, Exhibit B (Carroll Declaration) para. 7, and Exhibit E (Declaration of David Magill, VP of Administration and Legal at LISCO ("Magill Declaration")) para. 5.

[34]/ Comments of ACA at 23 and Exhibit B (Carroll Declaration) paras. 4-5.

[35]/ *See Id.*, Exhibit B (Carroll Declaration) at para. 5; Comments of the Midwest Electric Utilities at 16 and 23.

The Commission has repeatedly emphasized a policy of developing and adopting regulations that are based on quantifiable facts and data.[36] As demonstrated above, however, the assertions made by ACA in this proceeding misrepresent, mischaracterize, or simply ignore the facts in order to inaccurately and unfairly impugn utility pole attachment practices. ACA's assertions are thus at best unreliable, and therefore cannot serve as a reasonable basis for any Commission action.

D. The Commission Should Maintain the Time Periods Allowed for Survey, Cost Estimate, and Acceptance

The Midwest Electric Utilities reiterate that the Commission should not make any changes to the time allowed for a utility to survey the poles for which access has been requested.[37] Surveying the pole lies at the crux of ensuring safety, which cannot be compromised under any circumstances. The Commission must therefore ensure that utilities are provided sufficient time to conduct the surveys necessary to protect and maintain the safety, reliability, and integrity of the electric and communications infrastructure.

The Midwest Electric Utilities agree with other commenters that the current 14-day timeframe for the preparation of make-ready cost estimates should also be maintained.[38] Because actual electric make-ready costs can vary significantly based on a number of factors, this already relatively modest timeframe provides the utility the time needed to put together the best estimate of these costs that it can, which in turn provides the requesting attacher with better and more accurate information on which to base its deployment decisions. The Midwest Electric Utilities also agree with the POWER Coalition that by far the most significant cause of delay

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[36]/ *See, e.g.*, *NPRM* at ¶ 15 ("We urge commenters, whenever possible, to provide quantifiable data or evidence supporting their position.").

[37]/ Comments of the Midwest Electric Utilities at 23-24.

[38]/ *See* Comments of the Coalition of Concerned Utilities at 24.

between the approval of an application and the beginning of construction is the attacher's acceptance of the make-ready estimate and delivery of the make-ready payment.[39] Like the members of the POWER Coalition, the Midwest Electric Utilities will generally honor their make-ready estimates for longer than the required 14-day timeframe in order to spare the expense – and further delay – of requiring an application to be resubmitted.[40]

Finally, the Midwest Electric Utilities agree with the Electric Utilities Group that the Commission should amend Section 1.1420(d) of its rules to clarify that a utility must provide an estimate of the costs to perform make-ready only on the utility's own facilities and is not required to provide an estimate of the costs to perform make-ready on other attachers' facilities.[41] Although a utility might be able to describe the type or extent of make-ready work needed involving communications attachments, utilities do not have any information about or access to the costs of make-ready by a third-party attacher.[42]

E. The Volume of Pole Attachment Requests Depends on the Total Number of All Poles Covered by All Pending Applications, Not on Individual Applications

As it considers the applicable timeframes for various stages of the pole attachment process, a key fact that the Commission must bear in mind is that a utility's workload and ability to review and approve applications, as well as to perform any necessary make-ready on electric facilities, is based on the cumulative number of all poles covered by all applications under

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[39]/ Comments of the POWER Coalition at 8.

[40]/ *Id*. at 8-9.

[41]/ Comments of the Electric Utilities Group at 15.

[42]/ Comments of the Midwest Electric Utilities at 24, note 25. To the contrary, ACA illogically asserts that the Commission should enforce Section 1.1420(d) as currently written and require utilities to provide cost estimates for make-ready for all communications facilities as well, even though utilities do not even have access to this information. Comments of ACA at 21, note 72.

review at any given time, not on the specific number of poles requested by a single attacher.[43] As explained in their initial comments, the Midwest Electric Utilities review and process all pole attachment applications on a neutral, non-discriminatory, "first-come, first-served" basis without regard for the identity of the requesting attacher or the number of poles requested.[44] It is therefore irrelevant whether an individual attacher's request covers 20 poles, 50 poles, or 500 poles – the only relevant factor is the total number of poles under review.

Accordingly, the recommendations made by various commenters to adopt shorter review timeframes or make-ready timeframes for "smaller" orders from individual attachers are impractical and unrealistic.[45] These proposals may seem logical from an attacher's singular point of view taking into account only its own individual needs, but these proposals ignore the fact that a utility may have a number of applications pending from any number of other attachers at different stages of the review process at any given time. Thus, from the attacher's perspective, there is only one application pending for 30 poles, while from the utility's perspective there may be five different applications pending from five different attachers for a total of anywhere from 150 to 500 poles or more, all of which must be reviewed and approved within 45 days under the current rules. In such circumstances, the only way that a utility would be able to meet a shorter timeframe for a "smaller" application would be to move the "small" application up in the queue ahead of any "normal" applications, even if the normal applications were submitted first. Thus, a system that effectively requires a utility to prioritize "small" applications over others would

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[43]/ *See* Comments of the Midwest Electric Utilities at 21; Comments of the Coalition of Concerned Utilities at 22-23.

[44]/ Comments of the Midwest Electric Utilities at 21.

[45]/ *See* Comments of ACA at 41-44; Comments of NCTA at 8; Comments of Lumos Networks at 5; Comments of WTA at 18-19; Comments of NTCA at 6-7.

increase the potential for delays in the processing of "normal" applications and open up the entire process to gamesmanship by attachers seeking to delay their competitors' deployments.

For similar reasons, for purposes of applying the relevant extensions for both the application review and make-ready timeframes, the Commission should revise its definition of "large" and "very large" orders to apply to the total number of poles requested in a given 30-day period by all requesting attachers, not just the number of poles requested in that period by a single attacher.[46] Based on their own experience, the Midwest Electric Utilities also agree with the Electric Utilities Group that good faith negotiation for higher-volume projects yields the best results.[47] The Midwest Electric Utilities therefore urge the Commission to heed the advice of the Oregon Electric Utilities based on their experience with the Oregon rule requiring parties to negotiate a mutually satisfactory extended timeframe for applications exceeding a certain number of poles.[48] The Oregon Electric Utilities point out that Oregon's rules "recognize that electric utilities are situated differently, and thus, the amount of time it takes could vary on a project by project basis," and therefore the Oregon Electric Utilities "encourage the Commission to consider modifying its existing rule so as to be less rigid, and more flexible to adapt to the complexities confronted by the utility that is processing a large order."[49]

F. Sufficient Time Will be Needed to Transition to Any New Timeframes the Commission May Adopt

To the extent the Commission should determine to shorten any of the current timeframes for the pole attachment process, the Commission must also provide pole owners with sufficient

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[46]/ Comments of the Midwest Electric Utilities at 21-22; Comments of the Coalition of Concerned Utilities at 22-23; Comments of AT&T at 10-11.

[47]/ Comments of the Electric Utilities Group at 18.

[48]/ Comments of the Oregon Electric Utilities at 5.

[49]/ *Id.*

time to implement the measures necessary to comply with any such new timeframes. As discussed above, any changes to the timeframes for the application review and survey process would require utilities to identify, retain, and train additional staff resources (to the extent this would even be possible in the first place) in order meet the new timeframes without compromising the safety, reliability, and integrity of the electric and communications infrastructure. This process necessarily takes time and cannot be done at the drop of a hat.

Utilities would also need sufficient time to review and implement changes to their pole attachment management process necessary to meet any revised timeframes. For utilities who utilize electronic management systems, this may require significant changes to their software and systems that will require time and which could have a significant cost impact.

G. Additional Proposals Not Raised in the *NPRM*

The Midwest Electric Utilities respond below to additional proposals submitted by commenters that were not in the *NPRM* itself. In particular, the Midwest Electric Utilities oppose any proposals that would effectively impose a national engineering standard on electric utilities, as well as calls for the Commission to expand the applicability of its pole attachment regulations beyond the scope of its statutory authority.

1. The Commission Should Not Micromanage Electric Utility Safety Standards

The Commission should reject any proposals to adopt national engineering standards and should reiterate that state and local requirements and individual utility safety standards affecting pole attachments remain entitled to deference.[50] As stated by the National Association of Regulatory Utility Commissioners ("NARUC"), Congress, through Section 224(f) of the Act

[50]/ *See e.g.*, Comments of Crown Castle at 10 (proposing that the Commission declare that any construction standard imposed by a utility that exceeds the NESC clearance standards by more than 20 percent is presumptively unjust and unreasonable).

"explicitly recognized that the FCC must consider the potential impact of its regulations on safety as well as the reliability and security of the electric grid and ratepayers."[51] As further explained by NARUC, the Commission "should reaffirm that many State laws that impact pole attachment safety and reliability issues, *e.g.*, state occupational safety and health, high voltage line, and storm hardening laws/regulations, are entitled to deference."[52]

The Commission has previously recognized the importance of State and local laws and individual utility safety standards that go above and beyond the minimum safety standards imposed by the NESC. The Commission has found that "[u]niversally accepted codes such as the NESC do not attempt to prescribe specific requirements to each attachment request and neither shall we."[53] In the *2011 Pole Attachment Order*, the Commission noted that it had previously declined to adopt the NESC because "no single set of rules could take into account all attachment issues . . . ."[54] Furthermore, the Commission "also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal state, and local laws also impose relevant restrictions."[55] The Commission can ensure non-discriminatory application of standards, but it cannot create standards or micromanage internal utility safety standards. The NESC is not a ceiling; rather it is a floor from

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[51]/ Comments of NARUC at 5-6.

[52]/ *Id*. at 7.

[53]/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Report and Order, 11 FCC Rcd 15499, 16068 at ¶ 1143 (1996) ("*Local Competition Order*").

[54]/ Implementation of Section 224 of the Act; A Nationla Broadband Plan for Our Future, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5246 at ¶ 11 (2011) ("*2011 Pole Attachment Order*") (*citing Local Competition Order*, 11 FCC Rcd at 16068-69, paras. 1145-46 (finding that the NESC's depth of detail and allowance for variables make it unworkable for setting access standards)).

[55]/ *Id.* (*citing Local Competition Order*, 11 FCC Rcd at 16068-69, paras. 1147-48 (finding that FERC and OSHA regulations and utility internal operating standards reflect regional and local conditions as well as individual needs and experiences of the utility)).

which utilities may set additional standards taking into account State and local laws, regional and local conditions, and the individual needs and experiences of the utility. In short, it is not a "one-size-fits-all" answer that addresses all utility concerns. Therefore, the Commission cannot require that utilities solely construct their electric facilities to NESC minimum standards.

2. The Commission Should Not Attempt to Regulate Access to Light Poles

The Commission should also decline any invitations to extend the scope of its pole attachment regulations to utility-owned light poles.[56] Light poles are not – nor were they ever intended to be – covered under the scope of Section 224 of the Communications Act. The federal courts have held that the scope of Section 224 was intended to be limited to a utility's local distribution facilities and have rejected previous efforts by the Commission to regulate facilities that do not carry distribution lines.[57] Light poles are not part of an electric utility's local electric distribution system and do not carry or support any communications or electric distribution lines, thus they are not facilities that are "used, in whole or in part, for any wire communications."[58]

From a purely practical standpoint, any effort by the Commission to regulate the terms and conditions of access to light poles would be nearly impossible to implement or administrate. Compared to utility distribution poles, light poles come in a staggering array of heights, materials, and configurations that would make any effort to develop a standardized access framework or rate formula hopelessly complex. In addition, utility-owned light poles must often comply with the requirements of various municipal franchise agreements, state highway

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[56]/ *See* Comments of the Wireless Infrastructure Association at 74.

[57]/ *See Southern Co. v. FCC*, 293 F.3d 1338, 1345-46 (11th Cir. 2002).

[58]/ *See* 47 U.S.C. § 224(a)(1).

administration guidelines, and other restrictions and specifications related to everything from public safety to visual impact (such as in town centers, etc.) which greatly restrict utilities' ability to make any changes or alterations and which can vary widely across a utility's service area.

Finally, any effort by the Commission to regulate the terms and conditions of access to utility-owned light poles would raise a constitutional takings issue under the Fifth Amendment due to the near-impossibility of developing any kind of rational formula that could provide utilities with adequate compensation on any consistent basis, as well as the impact that any such regulatory intervention would have on the existing free market for wireless infrastructure access and collocation.

II. CERTAIN REVISIONS TO THE MAKE-READY PROCESS COULD ADDRESS THE COMMISSION'S CONCERNS – BUT THEY MUST IN NO WAY COMPROMISE THE SAFETY AND RELIABILITY OF EXISTING INFRASTRUCTURE

The Commission received a number of comments and recommendations on its various proposals for shortening the timeframe for the completion of make-ready work in the communications space on the pole,[59] as well as on alternative make-ready processes.[60] The Midwest Electric Utilities agree that some of these proposals could potentially address many of the delays and other issues affecting infrastructure deployment and thus merit further consideration. However, the Commission must take great care to ensure that any proposals or measures that it may adopt do not in any way compromise the safety, reliability, and integrity of the electric and communications infrastructure.[61]

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[59]/ *NPRM* at ¶¶ 11-12.

[60]/ *Id.* at ¶¶ 13-31.

[61]/ *Id*. at ¶ 6.

Above all, and as discussed below, the Commission should clarify that any of the proposals or recommendations made in this proceeding regarding make-ready would apply only to make-ready work performed in the communications space. Due to the significant risks to both worker and public safety and to the reliability of essential electric utility services, under no circumstances should a utility be required to allow access to or allow work to be performed in the power supply on the pole by any person or entity who is not under the utility's direct control and supervision.

A. The Commission Should Make Clear that Any Work by Attachers or Their Contractors is Limited to the Communications Space

The Midwest Electric Utilities again strongly urge the Commission to clarify that any changes to the make-ready timelines or to the make-ready process discussed in its *NPRM* would apply *only* to the performance of make-ready work in the communications space and would *not* apply to the performance of any work above the communications space on the pole.[62] As the Commission has recognized, performing make-ready in the area above the communications space is inherently dangerous as it places workers in the vicinity of potentially lethal energized electric utility facilities.[63] Accordingly, work in the supply space (as the area above the communications space is called under the NESC) must remain under the full control and direction of the utility because it raises significant safety issues and implicates the safety, reliability, and integrity of the nation's electric grid.

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[62]/ Comments of the Midwest Electric Utilities at 30; *See also* Comments of the Electric Utilities Group at 8-11; Comments of the POWER Coalition at 11 (urging a clear definition of "make-ready" that, among other things, expressly excludes all work above the communications space and all work that requires an outage or interruption of electrical service).

[63]/ *NPRM* at ¶ 12; *See also 2011 Pole Attachment Order*, 26 FCC Rcd at 5277, ¶ 80 ("We … maintain that safety concerns must take priority when communications equipment is installed among or above potentially lethal electric lines.").

The Midwest Electric Utilities agree with the Electric Utilities Group and the Coalition of Concerned Utilities that the Commission's proposal to require utilities to maintain a list of contractors authorized to perform make-ready in the power supply space on the pole raises significant concerns.[64] In particular, the Commission's proposal has already prompted certain communications companies to urge the Commission to allow attachers to use contractors to perform make-ready in the power supply space.[65] If this is what the Commission ultimately has in mind, then the Midwest Electric Utilities join with the Electric Utilities Group in strongly opposing any such revision on engineering, operational, safety, and reliability grounds.[66] As the Midwest Electric Utilities have previously explained, any work performed in the power supply space requires effectively managing not only the safety of workers, but also the potential risks to public safety that may arise as a result of power outages, downed energized lines, and so forth.[67] Utilities must therefore exercise strict control over any work performed in or above the supply space and cannot permit access to any personnel not fully trained and qualified to work near or among energized facilities and who are not under the direct control or supervision of the electric utility.[68]

The Texas Office of Public Utility Counsel likewise recognizes the significant safety concerns raised by any make-ready work above the communications space, noting that such

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[64]/ Comments of the Electric Utilities Group at 9-10; Comments of the Coalition of Concerned Utilities at 28-29.

[65]/ *See, e.g.*, Comments of Crown Castle at 19; Comments of ACA at 45-46; Comments of Mobilitie at 8-9.

[66]/ Comments of the Electric Utilities Group at 9.

[67]/ Comments of the Midwest Electric Utilities at 28-29.

[68]/ *Id*.; *See also* Comments of the Electric Utilities Group at 9 ("…this work must remain within the exclusive control of the Electric Utilities – whether performed by highly skilled internal or external resources."); Coalition of Concerned Utilities at 28.

work can affect reliability and safety when it causes an outage of electric services.[69] According to the Texas Office of Public Utility Counsel, the "safe and reliable operation of the electric grid is a higher priority than accelerating the attachment of broadband facilities," and the Commission's proposals should therefore "limit the make-ready work to the communications space."[70]

B. Changes to the Timeframe for Make-Ready Work in the Communications Space Raise Concerns Regarding Safety and Reliability

As stated in their initial comments, other than facilitating notice to existing communications attachers of the need for make-ready and conducting post-construction inspections, the Midwest Electric Utilities have little or no direct involvement in the performance of make-ready work in the communications space.[71] All of the make-ready work in the communications space is performed either by the new or existing attachers or by their qualified contractors, and any coordination concerning matters such as the use of contractors, the timing of completion of make-ready work, and so forth, is entirely in the hands of the communications companies.[72] The Midwest Electric Utilities also take no part in the selection or approval of the contractors used for work in the communications space.[73] Based on the initial comments filed in this proceeding, many other electric utilities take a similar approach.[74]

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[69]/ Comments of the Texas Office of Public Utility Counsel at 4.

[70]/ *Id*.

[71]/ Comments of the Midwest Electric Utilities at 25-26.

[72]/ *Id*.

[73]/ *Id*.; *See also* Comments of the POWER Coalition at 13 ("The members of the POWER Coalition do not, under any circumstances, recommend, pre-approve, authorize, or select specific contractors for work in the communications space. It is both the right, and the duty of an attacher to determine the contractor that is best qualified to perform work in the communications space.").

[74]/ *See* Comments of the POWER Coalition at 11-13; Comments of the Electric Utilities Group at 18-21; Comments of Puget Sound Energy at 2.

Several commenters have urged the Commission to shorten the current timeframe for the performance of make-ready work.[75] However, the Midwest Electric Utilities already find numerous violations and errors in their post-construction inspections,[76] and are therefore concerned that any acceleration of the timeframe for the completion of make-ready work in the communications space will result in even more safety violations and construction deficiencies.

If the Commission should nevertheless decide to adopt some form of shortened timeframe for the completion of make-ready work in the communications space, then, in order to protect the safety and integrity of the electric and communications infrastructure, the Commission must also provide utilities with an effective mechanism – such as the ability to impose monetary penalties and/or to freeze the processing of pending or future applications – to enforce compliance by new and existing attachers with applicable safety and engineering codes, standards, and requirements and to compel attachers to correct violations found after construction is complete.[77]

An effective enforcement mechanism would also serve to eliminate many of the delays that are presently experienced during the pole attachment process by providing an incentive to

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[75]/ *See, e.g.*, Comments of Lightower at 7; Comments of Crown Castle at 17; Comments of ACA at 42; Comments of ExteNet at 52.

[76]/ As described in their initial comments, We Energies finds issues during approximately 50% of the post-construction inspections that it conducts, including safety violations, encroachment issues, and the failure to construct in accordance with the approved design. Alliant Energy reports that 63% of the projects that have been completed have violations that were found during post-construction inspection, and Xcel Energy reports similar post-construction inspection findings. Comments of the Midwest Electric Utilities at 26.

[77]/ *See* Comments of the POWER Coalition at 13; Comments of Puget Sound Energy at 6 and 12-13; Comments of the Coalition of Concerned Utilities at 20-21. The Oregon Electric Utilities explain that the State of Oregon has addressed this problem with a rule that provides for a sanction of $200 per pole for safety violations or for violating the issued attachment permit or underlying pole attachment agreement. Comments of the Oregon Electric Utilities at 7 (*citing* OR. ADMIN. R. 860-028-0150).

new and existing attachers to ensure that their make-ready work and construction in the communications space is performed in a timely manner and in full compliance with all relevant safety and construction requirements, thus reducing the amount of time that is currently lost to the need to correct violations.[78] The Midwest Electric Utilities therefore agree that the Commission should consider adopting a remedy similar to the Oregon rule that provides for a sanction of $200 per pole for safety violations by attachers and for violations by an attacher of its underlying permit or pole attachment agreement.[79]

In addition, the Commission must reject the proposals made by Crown Castle and Lightower to add a new timeframe to the make-ready process for the delivery of electric power.[80] Investor-owned utilities provide electric service pursuant to regulations and tariffs that are strictly regulated by their respective state utility commissions. The provision of electric service to communications attachers is governed by the same tariff provisions and regulations that apply to other commercial customers, and utilities may not provide communications attachers with preferential treatment, nor does the Commission have the authority to compel them to do so.

The Commission should also confirm that "make-ready" does not include pole replacements and that pole replacement work does not fall within the scope of any of the make-ready timeframes.[81]

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[78]/ *See, e.g.*, Comments of Puget Sound Energy at 6 ("PSE supports the concept of penalty fees and believes that penalties for make-ready non-compliance are the only practical way to incent Communications Companies to perform required make-ready work in a timely manner.").

[79]/ OR. ADMIN. R. 860-028-0150; *See* Comments of the Oregon Electric Utilities at 7; Comments of the Coalition of Concerned Utilities at 21.

[80]/ Comments of Crown Castle at 22; Comments of Lightower at 7-8.

[81]/ *See* Comments of Puget Sound Energy at 7; Comments of the POWER Coalition at 20, note 35.

Finally, the Midwest Electric Utilities agree with the Coalition of Concerned Utilities that another effective way of addressing delays in the completion of make-ready work in the communications space would be to allow new attachers to file complaints with the Commission directly against existing attachers who fail to comply with their obligations under the Commission's rules.[82] This would provide another means to hold attachers accountable to ensure that they perform all of their work and fulfill all of their make-ready and construction obligations in a safe, sound, and timely manner, thus addressing perhaps the most significant cause of delay (and frustration) in the pole attachment process.

C. The Commission's Information Disclosure Proposals Raise Significant Cost Concerns and Could Compromise the Security of Critical Infrastructure

The record clearly demonstrates that any proposal to require utilities to establish and maintain a publicly-available online database or otherwise publicly disclose information on the location and availability of poles or utility conduit – as well as information such as the number of existing attachers, the physical condition of the poles, available communications space, etc. – would be, as the Commission previously concluded, prohibitively expensive and time-consuming, difficult to maintain accurately, provide dubious value to attaching entities, and – most importantly – raise legitimate concerns about making critical infrastructure information and proprietary information available to the public.[83]

Although the use of electronic pole databases and systems by utilities has gradually increased since 2011, these systems have been implemented on a voluntary basis and have been

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[82]/ Comments of the Coalition of Concerned Utilities at 19.

[83]/ *2011 Pole Attachment Order*, 26 FCC Rcd at 5280, ¶ 89. *See also* Comments of the Midwest Electric Utilities at 33-35; Comments of the Texas Office of Public Utility Council at 4-5; Comments of the Coalition of Concerned Utilities at 53-59; Comments of the POWER Coalition at 17; Comments of the Edison Electric Institute at 35-36; Comments of AT&T at 24-25; Comments of Frontier at 20-21; Comments of CenturyLink at 16-17; Comments of ITTA at 30-31.

specifically tailored and phased in within the parameters and timeframes of the individual utility's unique budgetary and operational circumstances and environment. The Commission may therefore encourage the continued voluntary deployment of such systems, but cannot mandate a solution without implicating the significant financial, administrative, operational and security concerns described in the record and by the Commission itself in 2011.[84]

III. THE COMMISSION'S PROPOSALS FOR REDUCING RATES FOR POLE ATTACHMENTS ARE UNREASONABLE AND WILL NOT FACILITATE BROADBAND DEPLOYMENT

The Midwest Electric Utilities reiterate their strong opposition to the Commission's proposals for excluding capital costs from the pole attachment rental rates, as well as to the Commission's proposals concerning the relationship between ILECs and utility pole owners.[85] As discussed herein, the Commission's proposals will impose significant burdens on utilities, unfairly subsidize communications attachers at the expense of electric utility customers, and will not facilitate the deployment of broadband service.

A. The Commission Should Not Exclude Capital Costs from Pole Attachment Rates

The comments submitted by the electric utility industry clearly demonstrate that the Commission's proposal to exclude capital costs from the pole attachment rate formula is unwarranted, contrary to established precedent, and would result in the shift of a significant cost burden onto electric utility customers. As explained by the Utilities Technology Council ("UTC"), stripping capital costs from the telecom rate formula "would exacerbate the systematic under recovery of utilities' costs associated with the current rate formula."[86] UTC further explained that stripping capital costs from the formula "is also contrary to the express terms of

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[84]/ *See* note 83, *supra*.

[85]/ Comments of the Midwest Electric Utilities at 40-46.

[86]/ Comments of UTC at 19.

the statute that provide for reimbursement of the capital costs of pole attachments and Congress's intent for the recovery of a pro-rata portion of the unusable space costs."[87]

The Midwest Electric Utilities agree with the POWER Coalition that "the exclusion of capital costs not otherwise recovered through make-ready fees from pole attachment rates would still frustrate Congress' expectation that an attacher's right to access poles be predicated on it sharing in the costs of pole infrastructure, and such an exclusion would still unduly burden utility ratepayers."[88]

The Coalition of Concerned Utilities correctly point out that "the pole attachment rental rate is designed to allow utility pole owners to recover from communications attachers some portion of the utility's annual costs of owning and maintaining the pole distribution system that the communications attachers make use of."[89] The Midwest Electric Utilities agree that the issue is therefore not whether attaching entities "cause" the capital costs to own and maintain a pole, but rather that these capital costs "are still expenses incurred by the pole owner to own and maintain the pole plant that communications attachers use, and so communications attachers should pay their fair share of those five annual costs."[90] If attachers do not pay their fair share of these costs, then "any additional costs shifted from attachers to pole owning utilities necessarily 'would unduly burden their ratepayers' in the form of higher electric rates."[91]

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[87]/ *Id*.

[88]/ Comments of the POWER Coalition at 24 (referencing the *2011 Pole Attachment Order* at ¶ 149).

[89]/ Comments of the Coalition of Concerned Utilities at 34.

[90]/ Comments of the Coalition of Concerned Utilities at 35.

[91]/ Comments of the POWER Coalition at 25; *See also* Comments of the Midwest Electric Utilities at 42.

In this proceeding, the Commission has asked what it can do to encourage utilities to proactively make room for future attachers.[92] The answer is that the Commission should not adopt its proposal to exclude capital costs from the pole attachment rate formula because "[e]xcluding unrecovered capital costs for attachment fees will not encourage proactive infrastructure sharing."[93]

B. The Commission Should Not Further Disturb the Joint Use Relationship Between ILECs and Electric Utilities

The Midwest Electric Utilities strongly opposed the Commission's proposals to presumptively apply the telecommunications rate formula to attachments by an ILEC and to place the burden of proof on an electric utility in a complaint case brought by an ILEC.[94] The record developed in this proceeding makes clear that the Commission's proposals would violate established legal precedent and would be arbitrary and capricious. The record also confirms that the proposed burden-shifting will not end any supposed controversy or avoid repeated disputes, contrary to the Commission's suggestion.

In particular, the legal analysis provided by the POWER Coalition demonstrates that the Commission's proposed burden-shifting rules violates United States Supreme Court precedent that the burden of proof falls upon the party seeking relief under a federal statute that is silent on the burden of proof issue.[95] As explained by the POWER Coalition, the Court determined in *Schaffer v. Weast* that where a statute is silent on the burden of persuasion, the default rule is that

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[92]/ *NPRM* at ¶ 11.

[93]/ Comments of the POWER Coalition at 25; *See also* Comments of EEI at 42 (stating that the exclusion of non-make ready capital costs will reduce incentives to create more available communications space).

[94]/ Comments of the Midwest Electric Utilities at 42-46.

[95]/ Comments of the POWER Coalition at 27-30.

the plaintiff bears the burden of persuasion and the risk of failing to prove its claims.[96] The Court eloquently summarized the governing rule as follows:

> Decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding – as petitioners urge us to do so here – are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.[97]

It is clear in this case that the relevant statute – Section 224 of the Act – does not address which party in a complaint case bears the burden of proof. There is certainly no evidence of Congressional intent to place the burden of persuasion on an electric utility. In a complaint case bought by an ILEC against an electric utility, the ILEC is clearly the party seeking relief, *e.g.*, a rental rate for its attachments that is lower than what it has agreed to under an existing joint use agreement. As stated by the Electric Utilities Group, complaints will continue to be filed at the Commission, but "now the burden of proof will fall on the party seeking to uphold the express terms of the contract (the electric utility) rather than the party seeking to 'get out' of the express terms of the contract (the ILEC)."[98] Therefore, the Commission must follow the Court's decision in *Weast* and continue to place the burden of persuasion on the ILEC plaintiff seeking to demonstrate that it is similarly situated to a non-ILEC attaching entity.

The Commission must also adhere to the legal analysis set forth by the Electric Utilities Group demonstrating that the agency may not reverse its decision to treat ILECs differently from telecommunications carriers or cable operators because the agency lacks a reasoned basis for its reversal.[99] The Electric Utilities Group explained that "an agency acts arbitrarily and

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[96]/ *Id*. at 27-28 (*citing Schaffer v. Weast*, 546 U.S. 49 (2005)).

[97]/ *Id*. at 28 (*quoting Weast*, 546 U.S. at 557-58).

[98]/ Comments of the Electric Utilities Group at 34.

[99]/ *Id*. at 31-34.

capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so."[100] However, as demonstrated by the Midwest Electric Utilities and others, the Commission has failed to provide a reasoned basis for its proposed departure from the existing rules that place the burden of persuasion on the ILEC to demonstrate it is entitled to a different attachment rate.[101]

The Electric Utilities Group also established that the Commission's proposed presumption that ILECs are entitled to a lower attachment rate is contrary to the facts and therefore unreasonable.[102] As noted by the Electric Utilities Group, the U.S. Court of Appeals for the D.C. Circuit has held that "[a] factual presumption that causes a shift in the burden of production must be reasonable . . . as we explain below, this means essentially that the circumstances giving rise to the presumption must make it more likely than not that the presumed fact exists . . . ."[103] In this proceeding, the record establishes that ILECs enjoy numerous advantages in traditional joint use agreements that offset any increased rates that might pay for pole access in certain circumstances. Therefore, the Commission may not adopt a presumption that shifts the burden in favor of ILECs because there is no sound and rational basis between the proven fact that ILECs enjoy these advantages under their existing agreements and

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[100]/ Comments of the Electric Utilities Group at 31 (*quoting Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001)).

[101]/ Comments of the Midwest Electric Utilities at 42-46; Comments of the Electric Utilities Group at 31-34; Comments of the POWER Coalition at 26 ("Thus, the Commission is justifying its proposed new presumption on a series of inconsistent disputes, in which the Enforcement Bureau provided no definitive guidance on how an electric utility could establish a just a reasonable rate for the voluntary right of pole access, and other benefits that ILECs presently receive nationwide as part of their joint use relationships.").

[102]/ Comments of the Electric Utilities Group at 25-30.

[103]/ Comments of the Electric Utilities Group at 25 (*quoting Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 910 (D.C. Cir. 1999).

the Commission's proposed inference that ILECs are entitled to the same rate as other attaching entities.

IV. CONCLUSION

For the reasons set forth above, the Midwest Electric Utilities submit that the record shows that many of the proposals raised in this proceeding will not achieve the Commission's stated goal of accelerating access to poles because they fail to address many of the underlying causes of delays in the pole attachment process. Rather, many of these proposals could put the safety, reliability, and integrity of the existing electric and communications infrastructure – as well as the safety of workers and the public – at undue risk of harm and would increase the cost of broadband deployment. Furthermore, the Commission's proposals for further reducing pole attachment rental rates and further altering the ILEC joint use relationship are unwarranted and contrary to established precedent. Moreover, these proposals will impose significant burdens on utilities, unfairly subsidize communications attachers at the expense of electric utility customers, and will not facilitate the deployment of broadband service.

WHEREFORE, THE PREMISES CONSIDERED, Alliant Energy, WEC Energy Group, and Xcel Energy Services respectfully request the Commission to take action in this docket consistent with the views expressed herein.

Respectfully submitted,

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